IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

PUBLIC INTEREST LITIGATION NO.10 OF 2005

Shri Mishrimal Jethamal Oswal
Indian Citizen, aged 63 years,
residing at 88/2, Radha Niwas,
Lonavala, District Pune .. Petitioner.

V/s.

1. The Municipal Council of
   Lonavala, through its Chief
   Executive Officer, Lonavala
   Municipal Council Building,
   Lonavala.

2. State of Maharashtra
   through the Secretary, Urban
   Development Department,
   Mantralaya, Mumbai 400 032.

3. The Collector of District
   Pune, Circuit House, Pune.

4. The Tata Power Company Ltd.,
   having its registered office
   at Bombay House, Fort, Mumbai.

5. Sahara India Commercial
   Corporation Ltd., situated at
   Amby Valley, Lonavala.

6. The Commanding Officer,
   INS Shivaji, Lonavala,
   Pune 410 402. .. Respondents.

Mr.K.K. Singhvi, senior advocate with Mrs.Tannu Mehta-Tiwari i/by Ms.Aparna Shinde for the petitioner.

Mr.S.V. Pitre for the respondent No.1.

Mr.P.M. Patil, Assistant Government Pleader for the respondent Nos.2 and 3.

Mr.S. Aney, senior advocate, Mr.C.S. Balsara, Mr.H.N. Vakil and Mr.D.D. Mehta i/by M/s.Mulla & Mulla for the respondent No.4 (Tata Power Co. Ltd.)

CORAM : R.M. LODHA &
NARESH H. PATIL, JJ.

DATED : 8TH/9TH & 10TH AUGUST, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.)

This writ petition entitled public interest litigation, crystalises three issues for our consideration and decision :

(one) Whether the writ petition is in pro bono publico;

(two) Whether the disputed pathway and the old bridge is a public road / public street; and

(three) Whether the closure of the said pathway and the old bridge by the respondent No.4 - Tata Power Company Limited is illegal, unjustified and unauthorised.

2. The controversy arises in the facts and circumstances, which we may notice immediately hereinafter.

3. Mishrimal Jethamal Oswal is the petitioner. He is inhabitant of Lonavala for the last 35 years. He has served as Municipal Engineer with the Lonavala Municipal Council and after his retirement claims to have been actively participating in the activities for improvement of civic facilities in Lonavala. In the Lonavala

village, Taluka Maval, District Pune, there is a dam. We shall refer to it as Lonavala dam. Lonavala dam is said to have been built somewhere in the year 1910. The water of the Lonavala dam is used through duct lines for production of electricity at Tata Hydro Electric Power Plant at Khopoli.

4. The petitioner says that right from boundary of the Lonavala dam on the eastern side their exists a pathway parallel to it running 775 meters. This pathway is said to have been dedicated to the public since inception of the Lonavala dam and the petitioner claims that members of the public have free ingress and egress to the said pathway. On the eastern side of this pathway, according to the petitioner, their exists a public road which was earlier known as ‘Sakur Pathar Road’ and thereafter as ‘INS Shivaji Road’ and now this road is known as ‘Jal Vaayu Marg’. INS Shivaji Road had to go through one way bridge starting at the end of the pathway on the south running parallel to the boundary of the Lonavala dam for about 200 meters. The petitioner’s case is that the said one way bridge is part of the public road and has been in use all throughout by the pedestrians and the motor vehicles including the State Transport Buses going to Bhushi Village. INS Shivaji Establishment had also been using the said one way bridge which is within the Municipal limits. The said

pathway and the one way bridge are said to have vested in the Municipal Council, Lonavala.

5. The petitioner has averred that by internal arrangement between the Municipal Council, Lonavala and INS Shivaji, the pathway and the one way bridge were maintained and lighted by INS Shivaji.

6. The pathway has been shown, according to the petitioner, as public road in the development plan of the Lonavala Municipal Council sanctioned in the year 1978. Even in the revised development plan of F-Ward of Lonavala of 1986, the pathway is shown public road.

7. The case of the petitioner is that in the month of July, 2004 or nearabout, the Municipal Council, Lonavala with some internal arrangement with respondent No.4 (Tata Power Company Limited), respondent No.5 (Sahara India Commercial Corporation Limited) and respondent No.6 (INS Shivaji) constructed a two-way bridge, parallel to the said oneway bridge, on the eastern side connecting INS Shivaji road. As a result thereof, the new two-way bridge is used on both the sides for vehicular traffic and the oneway bridge (or old bridge) for the pedestrians.

8. The grievance of the petitioner is that while

the new bridge was under construction, the respondent No.4 erected two iron gates, one on each end of the pathway, and stopped the public from using the said pathway except for an hour or two in the early morning and for evening walkers. In the month of September, 2004, the respondent No.4 closed the public road, going through the old bridge, by constructing a wall between the two bridges. According to the petitioner, the respondent No.4 has also put up an iron gate at the end of the old bridge so that the pathway which was earlier 775 meters has now become 975 meters in length and closed on both sides by iron gates.

9. Due to usurpation and closure of the pathway and the old bridge, the case of the petitioner is that, the public has been put to tremendous inconvenience and that now everyone going to Bhushi village has to walk over the new bridge having no footpath. The vehicular traffic being very heavy, the pedestrians are in constant danger of being runover.

10. The petitioner has inter-alia prayed that the respondent Nos.1 and 4 be directed to demolish the parapet wall and iron barricades and remove any obstruction on the pathway and the old bridge and allow the public to use the pathway and the old bridge without any hindrance.

11. In response to the writ petition, on behalf of respondent No.4, the first affidavit was filed on February 15, 2005. The respondent No.4 has raised the objection therein that the present writ petition is not a bona fide public interest litigation and that the petitioner is in reality espousing the cause of persons having bungalows nearby, particularly adjacent to the new bridge constructed by the Lonavala Municipal Council. It is alleged that these bungalow owners wish to utilise the pathway and the old bridge which in fact is the spillway and part of the Lonavala Dam belonging to respondent No.4.

12. The case of the respondent No.4, as set out in the said affidavit, is that they are holder of four licenses under the provisions of the Indian Electricity Act, 1910. The pathway and the old bridge are part of the land that was acquired by the State Government and the same was transferred to the Tata Hydro Electric Power Supply Company Limited (predecessor in interest of respondent No.4) for the purpose of generation of electricity. The respondent No.4 contends that in order to operate the dam, spillway was constructed which is a necessary safety feature of the dam. The spillway is a part of the dam and it has been constructed for the purpose of inspection, operation and maintenance of the

dam and the pathway on the spillway is not a road. The respondent No.4 has referred to the notifications dated January 15, 1972 and June 5, 1972 issued by the State Government under the provisions of the Official Secrets Act, 1923 and according to them the said notifications declare the disputed area 'prohibited area'. That the breadth of the top of the spillway admeasures 3.5 metres and they allowed vehicular traffic to pass over it is admitted. They have also admitted that the top of the spillway was given to INS Shivaji for maintenance. They admit in the said affidavit that the aforesaid spillway was being used by public. They have referred to the protests made by them vide letters dated May 4, 1994, August 5, 1994, March 1, 1995, April 10, 1995 and October 5, 1995. The respondent No.4 has stated that in view of changing scenario, it was felt by them that the said spillway should be closed for public vehicular traffic and, accordingly, with an arrangement of Lonavala Municipal Council, a new bridge has been constructed by the Lonavala Municipal Council admeasuring 12 metres in width and the said bridge is open for the vehicular traffic as well as the pedestrians. The respondent No.4 claims that the spillway continues to be owned by them and the same being shown as public road in the development plan is totally irrelevant as it is in the ownership and possession of respondent No.4. The respondent No.4 has

denied that it has usurped any public road whatsoever or that the same has been used for ingress and egress of the local public of Lonavala for the last 50 years as alleged. According to them, no hardship will be caused to the public, if, the wall fencing and iron gates remain as it is.

13. The petitioner filed rejoinder on March 1, 2005 to the reply-affidavit dated February 15, 2005 submitted by respondent No.4. He reiterated that the present writ petition has been filed in public interest representing the cause of the public in general and not for bungalow owners of Lonavala as alleged by respondent No.4. He submitted that large number of people of Lonavala was supporting the cause espoused through the petition. In this regard, he annexed copy of the letter dated February 20, 2005 signed by many persons aggrieved by the action of respondent No.4 in blocking the access to the public road. He has referred to few writ petitions filed by him earlier espousing the cause of the public and succeeding therein. Justifying the present writ petition in the nature of public interest, he has stated that the matter relates to the closure of public road in which he has no personal interest but the villagers of Bhushi cannot afford to approach this Court due to their economic backwardness and that led him to file this writ petition in public interest, in which other members of

public are supporting. In the rejoinder, the petitioner reiterated that the disputed road is a public road which has been so used by the public in general for the last more than 50 years and that the ownership of the land beneath a public road is an irrelevant factor for deciding the usage of a public road. It is also stated by him that as and when the respondent No.4 made attempt to close the disputed public road by deploying its own security guards, the protests were raised. He has referred to the letter dated December 19, 1996 complaining to the Commanding Officer of INS Shivaji in this regard.

14. Thereafter, another affidavit on March 14, 2005 was filed by the respondent No.4. By and large, it is reiteration and repetition of the stand set up in the affidavit filed on February 15, 2005. In this affidavit, respondent No.4 has stated that since the traffic increased considerably, they leased out a certain portion of its land for constructing 12 metres wide two-way bridge and the two-way bridge has been constructed by the Lonavala Municipal Council. According to the respondent No.4, as per the agreement dated March 12, 2004 entered into between them and the Lonavala Municipal council, it was agreed that after construction of bridge was over, the existing access of the traffic over the spillway shall be permanently

prohibited to all others except Tata Power Company for the purpose of safety and security of the dam. They have, thus, justified the construction of the wall, fencing and gates and prevention of the usage of the pathway and the old bridge by the public. The respondent No.4 has denied that the disputed road was at any point of time maintained by the public fund or that it can be used by the public as a matter or right.

15. The Lonavala Municipal Council (respondent no.1) through its Chief Officer filed reply affidavit on August 9, 2005. It is stated in the said affidavit that the communication dated November 17, 2004 was issued by the Council to respondent No.4 without giving any opportunity of hearing and without going through the leave and licence agreement dated March 12, 2004. The letter dated November 17, 2004 was purportedly issued only on the basis that prior to September, 2004, the spillway was open for the public. The Lonavala Municipal council in its affidavit has supported the case of respondent No.4 that the spillway is integral part of the dam and the exclusive control over the spillway by respondent No.4 is necessary to maintain the safety of the entire dam. The respondent No.1 has also stated that designation of the spillway portion in the draft development plan may not be given much importance and that no inconvenience is caused to the public at

large by closing the public way.

16. In response to the affidavit of respondent No.1 dated August 9, 2005 and further affidavit of respondent No.4 dated March 14, 2005, the petitioner filed his affidavit on August 18, 2005. We may not repeat the contents of the said affidavit as it is repetition of his stand set up in the writ petition and the rejoinder filed on March 1, 2005.

17. Then, respondent No.4 filed another affidavit on August 18, 2005. They reiterated in this affidavit that they have been enforcing their property rights by closing the pathway to public once in a year but the said practice was discontinued at the request of INS Shivaji and the Lonavala Municipal Council. Pertinently, in this affidavit also the respondent No.4 admitted the user of pathway on the spillway by public, both vehicular traffic as well as the pedestrians.

18. In addition to the affidavits that were filed by the respondent No.4 on February 15, 2005, March 14, 2005 and August 18, 2005, they sought to tender three further affidavits on September 12, 2005, July 25, 2006 and August 4, 2006. By the order passed by us on August 4, 2006, we rejected the prayer of the respondent No.4 to consider these three affidavits tendered on September

12, 2005, July 25, 2006 and August 4, 2006. As a matter of fact, the Bench that earlier heard the matter declined to take the affidavit dated September 12, 2005 on record. The affidavit dated July 25, 2006 is exactly identical as the affidavit of September 12, 2005 and, therefore, in our order dated August 4, 2006 we observed the affidavit dated September 12, 2005 having been declined to be taken on record, the affidavit dated July 25, 2006 is also declined to be taken on record. The affidavit dated August 4, 2006 was tendered by respondent No.4 after the senior counsel for the petitioner had concluded his arguments and, therefore, we found no justification to consider the said affidavit.

Re : (one)

Whether the writ petition is Pro Bono Publico ?

19. The objection of the respondent No.4 is that the present writ petition is not a bona fide public interest litigation and the petitioner is in reality espousing the cause of some other persons, namely, persons having bungalows adjacent to the new bridge constructed by the Lonavala Municipal Council. It was suggested by the senior counsel for respondent No.4 that one of such bungalow owners adjacent to the new bridge is none other

than Mr.K.K. Singhvi, senior counsel for the petitioner, and, he and the other bungalow owners wish to utilise the pathway on the spillway and the old bridge for their pleasure and enjoyment and the present petitioner has been put up by them. He would submit that the credentials of the petitioner must be examined at the threshold. According to him, there is no gross violation of any law nor any infringement of fundamental right of the petitioner nor there is anything to shock the conscience of the Court justifying invocation of this Court's jurisdiction in public interest litigation. He heavily relied upon three judgments of the Supreme Court viz., (i) The Janata Dal V/s. H.S. Chowdhury, AIR 1993 Supreme Court 892, (ii) Malik Brothers V/s. Narendra Dadhich & Others, (1996) 6 Supreme Court Cases 552 and (iii) Dattaraj Nathuji Thaware V/s. State of Maharashtra & others, AIR 2005 Supreme Court 540.

20. In Janata Dal (supra), the Supreme Court dealt with the scope and object of public interest litigation. The observations made in Gupta's case (AIR 1982 SC 149) noticed in Janata Dal and highlighted by Mr.Aney read thus :

> "But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others

> to delay legitimate administrative action or to gain a political objective .....".

21. Then the observations of Khalid, J. in Sachidanand Pandey V/s. State of West Bengal, [(1987) 2 SCC 1109] noticed in Janata Dal and referred to by Mr.Aney read thus :

> "Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion .... Public interest litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guide-lines and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions .... I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

22. In Malik Brothers, the Supreme Court cautioned that if the Court finds that in the garb of public interest litigation, actually an individual’s interest is sought to be carried out, it would be the bounden duty of the Court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

23. In a recent case in Dattaraj Nathuji Thaware, the Supreme Court in paragraph 11 of the report, held thus :

> "11. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with impostors and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect".

24. In the backdrop of the aforesaid legal position, we shall see the credentials of the petitioner and whether it is motivated, the nature of information given by the petitioner for redressal of the public injury and whether public in general are interested in the vindication of some right (of way).

25. The petitioner is inhabitant of Lonavala for last 35 years. He was earlier working as a Municipal

Engineer with the Lonavala Municipal Council. This is not denied. In paragraph 2 of his rejoinder filed on March 1, 2005, the petitioner has averred that this is not the first writ petition filed by him to espouse the public cause. Earlier in the year 1991, he filed Writ Petition No.4319 of 1991 challenging the action of the Lonavala Municipal Council in changing the user of reservation of schools and public spaces without modification in development plans. The said writ petition was disposed of by this Court on July 26, 2002 on Lonavala Municipal Council filing affidavit that in the revised plan, which has not yet come in operation, they will make appropriate modifications. Then in the year 1992, the petitioner filed the writ petition against the then Lokayukta and others challenging the rejection of his complaint regarding corruption on the part of the President and the Chief Executive Officer of the Lonavala Municipal Council. The said writ petition was disposed of by this court on January 10, 2005 directing that the complaint of corruption must be investigated to its logical conclusion. These facts would show that the petitioner is not simply busybody but a public spirited person taking up the public cause from time-to-time. He had been Municipal Engineer in the Lonavala Municipal Council and being resident of Lonavala, obviously, he has been raising the grievance of the public, concerning the Lonavala Municipal

Council. In the present writ petition, the petitioner has raised the grievance relating to closure of pathway and old bridge by the respondent No.4 and inaction on the part of the Lonavala Municipal Council in removal of such obstruction. The usage of the said pathway and the old bridge by the public in general for many many years is not even in dispute. The petitioner has placed on record the copy of the letter dated February 20, 2005 addressed to him. The said letter is signed by many persons. The grievance raised in the said letter is the grievance that is raised in the present writ petition. The senior counsel for respondent No.4, however, submitted that the letter dated February 20, 2005 which bears signatures of many persons does not clearly show the names of all those persons and their addresses. Mr.K.K. Singhvi, senior counsel for the petitioner submitted that no details were sought from the petitioner in this regard, otherwise the names with complete addresses of those persons would have been furnished to the respondent No.4. Be that as it may, the fact of the matter is that the controversy in this writ petition by means of the public interest litigation is with regard to the closure of the pathway and the old bridge in use of the public (and allegedly as a matter of right) for many years and, therefore, the writ petition is for vindication of some right of the public in general. In the prayer for restoration of public

right of way, in our view, the public interest is apparent.

26. If the public road is closed and public is deprived of its right of way, the public injury is obvious. Can it be said in the circumstances that the writ petition is not in public interest. We do not think so. Merely because the bungalow owners near the new bridge are interested in the user of pathway and the old bridge, that would not mean that subject-matter ceases to be of public interest. Until the alleged illegal closure of the pathway and the old bridge by the respondent No.4, all along there has been user of the said pathway and the old bridge by the public. The public is said to have had right of ingress and egress and there was no obstruction to the access. The writ petition cannot be said to have been filed with dishonest intention nor can it be said to be actuated with ulterior motive.

27. It would be altogether different if while deciding issue no.2, it is held that the disputed pathway (and the old bridge) is not public road, then, obviously the writ petition must fail on that ground but it is not liable to be dismissed on the ground that it is not in Pro Bono Publico or that the writ petition has been filed to espouse the cause of few bungalow owners

adjacent to the new bridge constructed by the Lonavala Municipal Council in the year 2004.

28. We, accordingly, over-rule the objection of the respondent No.4 that the writ petition does not espouse the public interest.

Re : Issue (two)

Whether the disputed pathway and the one-way bridge (old bridge) is a public road / public street ?

29. This is crucial issue. We shall first notice the relevant statutory provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short ‘Act of 1965’).

30. Section 2(48) defines street thus :

> "2(48) "street" means any road, footway, square, court-alley or passage, accessible whether permanently or temporarily to the public, whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings about thereon and if it is used by any persons as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not; but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid;"

31. Public Street is defined in Section 2(42). It means any street, -

(a) over which the public have a right of way;

(b) heretofore levelled, paved, metaled, channelled, sewered, or repaired out of municipal or other public funds; or

(c) which under the provisions of this Act becomes, or is declared, a public street;"

32. Private Street is defined in Section 2(38), which means a street which is not a public street.

33. Though, it is not very relevant to consider the definitions of the ‘building’ and the ‘occupier’ as provided in Section 2(2) and 2(27) but since Mr.S. Aney, senior counsel for the respondent No.4 referred to the said definitions, we may also notice these definitions. Section 2(2) and 2(27) which defines building and occupier respectively, reads thus :

"2(2) "building" includes a house, out-house, stable, shed, but and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever, whether used as a human dwelling or otherwise, and also includes verandahs, fixed platforms, plinths, door steps, walls (including compound wall) and fencing and the like;"

"2(27) "occupier" includes -

(a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable,

(b) an owner living in or otherwise using his land or building,

(c) a rent-free tenant,

(d) a licensee in occupation of any land or building, and

(e) any person who is liable to pay to the owner damages for the use and occupation of any land or building;"

34. Chapter XI of the Act of 1965 deals with the streets and open spaces.

Section 173 provides for powers of Municipal Council in respect of public street, thus :

"173. (1) It shall be lawful for a Council -

(a) to pay out and make new public streets, including tunnels, bridges, sub-ways, and other works subsidiary to public streets ;

(b) to widen, open, extend or otherwise improve any public street or any work subsidiary to a public street ;

(c) to divert or close temporarily any public street;

(d) subject to the provisions of sub-section (2), to close any public street permanently.

2. Before any resolution to close any public street permanently is passed by the Council, the Chief Officer shall, by a notice put up in the street which is proposed to be closed permanently and also on the notice board in the municipal office, declare the intention of the Council to close the street permanently. The Council shall consider all objections to the said proposal made in writing and delivered at the municipal office within one month from the date of the publication of the notice under this sub-section before passing a resolution so to close the street permanently.

> 3. In laying out, making turning, diverting, widening, opening, extending or otherwise improving any public street, in addition to the land required for the carriage-way and foot-ways and drains thereof, the Council may acquire the land required for the construction of buildings to form the said street, and subject to the provisions of section 92, may sell and dispose of such additional land in perpetuity or on lease for a term of years, with such stipulations as to the class and description of buildings to be erected thereon as it may think fit."

35. By virtue of Section 174, the Municipal Council has power to declare any street as public street subject to objections by owners. Section 174 reads thus :

> "174.(1) The Council may, at any time, by notice fixed up in any street or part of a street which is not a public street, give intimation of its intention to declare the same to be a public street, and unless within one month next after such notice has been so put up, the owner or if there are more than one owner the owners of the greater portion of such street or of such part of a street lodges or lodge objections thereto at the municipal office, the Council may by notice in writing put in such street, or such part, declare the same to be a public street.
>
> (2) If such owner or owners object to the proposal under sub-section (1), the Council may, after considering such objections and with the previous sanction of the Collector, declare such street to be a public street, and the owner or owners so objecting shall be entitled to compensation determined in the manner provided in section 330.
>
> (3) Every such street which becomes a public street under this section shall vest in the Council".

36. Section 175 empowers the Municipal Council to require repair etc., of private streets and to declare

them as public streets. It reads thus :

> "175.(1) Where a Council considers that in any street not being a public street, or in any part thereof, within the municipal area, it is necessary for the public health, convenience or safety that any work should be done for the levelling, paving, metaling, flagging, channelling, draining, lighting or cleaning thereof, the Council may by written notice require the respective owners of the lands or buildings fronting, adjoining, or abutting upon such street or part thereof, to carry out such work in a manner and within a time to be specified in such notice.
>
> (2) After such work has been carried out by such owners, or as provided in section 328 by the Council at the expense of such owners, and if all land revenue payable to the State Government in respect of the land comprised in such street or part thereof has been paid, by such owners, the Council may, and on the joint requisition of the owners of such street or of the greater portion of such street, shall, under the provisions of section 174 and in the manner prescribed in that section, declares such street to be a public street, and such street shall thereafter vest in the Council.
>
> (3) If the notice under sub-section (1) is not complied with and such work is executed by the Council as provided in section 328, the expenses thereby incurred shall be apportioned by the Council between such owners in such manner as it may think fit, regard being had to the amount and value of any work already done by the owners or occupiers of any such lands or buildings".

37. Section 176 provides thus :

> "176.(1) The Chief Officer shall subject to the approval of the Council prescribe a line on each side of every public street within the municipal area.
>
> (2) The Chief Officer shall give a public notice of the proposal to prescribe such line for any street and shall also put up a special notice thereof in the street for which such line

is proposed to be prescribed. The Council shall before approving the line of the street consider all objections or suggestions in respect of the said proposal made in writing and delivered at the municipal office within one month from the date of the publication of the notice under this sub-section.

(3) The line for the time being so prescribed shall be called "the regular line of the public street".

(4) The Chief Officer may from time to time in the manner laid down in sub-sections (1) and (2) prescribe a revised line in substitution of any regular line of street already prescribed and any reference in this Act to the regular line of the public street shall be deemed to include a reference to such revised line.

(5) No resolution approving a regular line of a public street under sub-section (1) or approving a revised line under sub-section (4) shall be passed by the Council if such line or revised line has the effect of reducing the width of the street or shifting any such line towards the centre of the street, without the previous sanction of the Collector.

(6)(a) Except under the provisions of section 180 no person shall construct or reconstruct any portion of any building within the regular line of a public street or within such distance behind the regular line of the public street as may be prescribed by by-laws, without the permission of the Chief Officer;

(b) Where the Chief Officer refused permission to construct or reconstruct any building in any area within the regular line of the public street, such area shall, with the approval of the Council, be added to the street and shall thenceforth be deemed part of the public street and shall be vested in the Council;

(c) Compensation, the amount of which shall, in case of dispute, be ascertained and determined in the manner provided in section 330 shall be paid by the Council to the owner of any land added to a street under clause (b) for the value of the said land, and to the owner of any buildings or any loss, damage or expense incurred by such owner in consequence of any

action taken or order passed by the Chief Officer under this sub-section :

Provided that, no such compensation shall be payable in respect of any building or portion thereof in respect of which a notice has been issued under sub-section (1) of section 195.

(7) The provisions of sub-sections (8), (9) (10) and (11) of section 189 shall mutatis mutandis apply to any building or portion of a building constructed in contravention of the provisions of clause (a) of sub-section (6).

38. No projections, obstructions and encroachments in respect of public streets is permissible except the written permission of the Chief Officer. Section 179 reads thus :

"179.(1) No person shall, except with the written permission of the Chief Officer under sub-section (4) -

(a) build or set up, any fence, rail, post, stall, platform or any projecting structure or thing, or make any other encroachment or obstruction;

(b) place or deposit or cause to be placed or deposited any box, bale, package, or merchandise or any other thing;

in any public street or upon any drain, gutter, sewer or aqueduct in such street.

(2) Whoever contravenes any provision of sub-section (1), shall, unless the provisions of clause (a) of sub-section (6) of section 176 apply, on conviction be punished with fine which may extend to one hundred rupees, and in the case of a continuing contravention with further fine which may extend to twenty rupees for every day after the first during which such contravention continues.

(3) The Chief Officer shall have power to remove without notice any such projection, obstruction or encroachment -

(i) made in contravention of sub-section (1) or contrary in any manner to any permission granted under sub-section (4); or

(ii) in respect of which the period specified in the permission under sub-section (4), has expired.

(4) Subject to the provisions of the bye-laws, if any, the Chief Officer may allow any temporary occupation of or erection in any public street -

(i) on occasion of festivals and ceremonies in such manner as not to inconvenience the public or any individual;

(ii) for depositing timber, bricks or other material that has been or is intended to be used for building purposes;

(iii) for any other purpose specified in the by-laws.

(5) Permission granted under sub-section (1) or (4) shall be terminable at the discretion of the Chief Officer on his giving not less than twenty-four hours, written notice to the person to whom such permission was granted. Such notice shall state the reasons for such action.

(6) Every person to whom any permission is granted under sub-section (1) or (4) shall, at his own expense, cause the place where he has set up any erection of deposited anything, to be properly fenced and guarded, and, in all cases in which the same is necessary to prevent accident, shall cause such place to be well lighted during the night.

(7) Every person to whom any permission is granted under sub-section (1) or (4) shall immediately after the removal of the erection made or thing placed or deposited restore and make good the street to the satisfaction of the Chief Officer.

(8) Whoever contravenes the conditions of any permission granted under sub-section (4), or fails to comply with the provisions of sub-section (6) or (7), shall, on conviction, be punished with fine which may extend to one hundred rupees, and in the case of continuing

contravention with further fine which may extend to twenty rupees for every day after the first during which such contravention continues."

39. Section 185 requires the Municipal Council to give a name or number to every public street. It reads thus :

"185. (1) The Council shall -

(a) give a name or a number to every public street;

(b) cause to be put or painted on a conspicuous part of any building, wall or any other place at or near each end or corner of or entrance to a public street, the name or the number by which such street is to be known :

(c) determine the number or sub-number by which any premises or part thereof shall be known;

and may be written notice require the owner of any premises or part thereof either to put up a metal plate showing the number or sub-number of such premises or part determined under clause (c) in such position and manner as may be specified in such notice or to signify in writing his desire that such work shall be executed under the orders of the Council.

(2) Any person, who destroys, pulls down or defaces any such name or number of a public street or number of sub-number of any premises or part thereof or puts up any name, number or sub-number different from that determined by the Council and any owner of any premises or part thereof who does not at his own expense put up such number or sub-number of such premises or part thereof shall on conviction be punished with fine which may extend to fifty rupees.

(3) Where a number or sub-number is put up on any premises or part thereof under the orders of the Council in accordance with sub-section (1), the expenses of such work shall be payable by the owner of such premises or part thereof, as the case may be.

> Explanation - In this section "premises" means any building, but does not include only walls, compound walls, fencing Verandahs, fixed platforms, plinths, door-steps or the like".

40. Having surveyed the relevant provisions of the Act of 1965, we shall turn to the admitted position that emanates from the three affidavits filed by the respondent No.4. In paragraph 6 of the affidavit dated February 15, 2005, it is said, ‘that the breadth of the top of the aforesaid spill way admeasured just 3.5 metres and, therefore, the Respondent No.4 allowed vehicular traffic to pass over and maintain the said top of the spill way to INS Shivaji’, ... ‘that the said spill way being extremely narrow, two way vehicular traffic cannot pass therefrom and vehicles were required to move only in one direction at a time’.

In paragraph 9 of the affidavit dated February 15, 2006, the respondent No.4 states, ‘the aforesaid spill way was being used by the public, ...’

In paragraph 12 of the affidavit dated February 15, 2005, the respondent No.4 states, ‘as the said spill way continues to be owned by respondent No,4, the same being shown as a public road in the development plan is totally irrelevant’.

In the second affidavit filed by the respondent

No.4 on March 14, 2005 also it is admitted that as there was no approach road to the village, the respondent No.4 allowed said 3.5 meters walkway to be used as one way limited traffic. It is further stated, 'that even today, the security personnel of respondent No.4 allow persons to walk on the aforesaid walkway on dam of spillway subject to the security precautions'.

In paragraph 5 of the said affidavit, the respondent No.4 states, 'the said walkway is allowed to be used as a walkway, but only vehicular traffic which used to be single-way on the spill way is stopped as there is a safer alternative 12 metres double way vehicular traffic which was already started plying on the new bridge constructed by respondent No.1.'.

Then in paragraph 10 of the affidavit dated March 14, 2005, the respondent No.4 stated, 'that as there was no direct approach road to the village, the same would have entailed the villagers to traverse over the considerable distance, respondent No.4 allowed the villagers to use the 3.5 metres walk-way on the spillway and dam and also allowed one way vehicular traffic, ...'.

41. In the third affidavit that has been filed by the respondent No.4 on August 25, 2005, it is admitted

in para 10 that the pathway on the spillway was allowed to be used by the public as there was no other passage to pass thereon to the otherside of the dam particularly to INS Shivaji. In para 16 of the said affidavit, the respondent No.4 has stated that despite the pathway on the spillway was just 3.5 metres, the same was utilised for one way vehicular traffic as well as the pedestrians.

42. It is true that the respondent No.4 has denied the disputed pathway and the one-way bridge to be public road. Rather they have claimed their ownership in respect of the pathway and the one-way bridge as their property. They have also denied any dedication of the way to public. The respondent No.4 has set up the case that they had been regularly enforcing their property rights by closing the pathway for public once in a year but the said practice was discontinued at the request of INS Shivaji. The senior counsel for the respondent No.4 contended that there is serious dispute about existence of public right of way and such disputed question of fact cannot be decided in extra-ordinary jurisdiction. He would also contend that spillway is an integral part of the dam and, therefore, it can never be part of public road.

43. The user of the pathway on the spillway and the

one-way bridge by the public, both vehicular traffic as well as pedestrians, prior to September, 2004 for many years is clearly established from the three affidavits that have been filed by the respondent No.4. It is also seen from the affidavits of the respondent No.4 that prior to September, 2004, the pathway on the spillway was the only passage or way available to pass thereon and reach the otherside of the dam particularly INS Shivaji. Though the Lonavala Municipal Council has sought to support the respondent No.4 in its affidavit yet from the perusal of paragraph 5 thereof it transpires that the spillway was open for public prior to September, 2004.

44. As and when the respondent No.4 sought to close a section of the road even for a day, that was seriously objected to by the public as well as INS Shivaji. The letter written by the Commanding Officer, INS Shivaji to Mr.Sanjay Singhvi on January 10, 2006 supports this view. The advertisement dated 12th/13th October, 1998 placed by the respondent No.4 on record along with reply affidavit dated February 15, 2005 only shows that the disputed road was closed for one day for private vehicles. Even on that day the Government vehicles and the Maharashtra State Transport buses plied their vehicles on the said route.

45. In Nawab Sardar Narharsingji Ishvarsingji V/s. The Secretary of State for India, XLII BLR 167, the Division Bench of this Court held that the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of the road. This is how the Division Bench considered the matter.

> "That the existence of a highway or a public road is consistent with the ownership of a private person in the soil can be deduced from the English as well as the Indian law. It is held in Sir John Lede V. Shepherd that by setting out a highway the owner does not part with the property of the soil. In Harrison v. Duke of Rutland it is held as follows (p.155) :-
>
> > 'The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side ad medium filum of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions.'
>
> See also City of London Land Tax Commissioners v. Central London Railway. It is observed in The Law relating to Highways by Glen at page 30 :-
>
> > 'The owner of the land who dedicates part of it as a public way may enjoy all rights not inconsistent with the dedication'.
>
> For distinction between a right of easement and the ownership of a highway see Pratt and Machenzie's Law of Highways, 18th Edn., p. 2. The law is also summarized in volume XVI of Halsburry's Laws of England, Hailsham Edition,

at pages 240-241, paragraphs 290-291, as follows :-

> ‘The public right in a highway being a right of passage only, an owner who expressly dedicates, or is presumed to have dedicated, land as a public highway retains at common law his property, in the soil, and can transfer it by conveyance or lease to others’.
>
> ‘There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of the soil of one half of the highway. ... and a similar presumption arises in the case of a private or occupation road’.

Under the Indian law also there is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land [Nihal Chand v. Azmat Ali Khan.] The site of the road must be presumed to belong to the adjoining proprietors half to one and half to the other up to the middle of the road. Where the property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river, as the case may be.

It would follow, therefore, that the use of the road by the public for passage as of right is not inconsistent with the proprietorship of a private individual to the soil of road and that, therefore, a road cannot be said to be the property of the Government because it is used by the public. ...."

46. The ownership of respondent No.4 with regard to spillway, in our view, is not inconsistent with the use of pathway on the spillway by public for passage as of right. We concur with the position that the existence of the public road is consistent with ownership of a private person in the soil. Ownership that respondent No.4 has in spillway, in other words, is subject to the right of the public to use pathway on the spillway.

47. The public way or public road or public street is a way over which their exists a public right of passage. By virtue of clause (a) of Section 2(42), the street is a public street over which the public has a right of way. A private street may become a public way by reason of the dedication of rights of passage to the public by the owner and on acceptance i.e., user of right by the public. The law does not require any definite form of dedication. The dedication may be express or implied. The user of the passage by the public for a long period of time by itself is presumptive evidence of dedication, though not conclusive. Save and except the stray instances of closure of pathway for private vehicles in a long span of fifty years by the respondent No.4, there is nothing that manifests an intention not to dedicate the way. If there was no dedication, where was the occasion for the disputed pathway and one way bridge being maintained by the Ministry of Defence (INS Shivaji). In paragraph 12 of the affidavit dated August 25, 2005, the respondent No.4 stated that they have been exercising their property rights by closing the pathway for public once in a year but the said practice was discontinued at the instance of INS Shivaji. There is letter of Commanding Officer, INS Shivaji written to Mr.Sanjay Singhvi way back in the year 1996 on record that the road (disputed

pathway and the one-way bridge) was maintained by Ministry of Defence and they have seriously objected to the action of respondent No.4 even in closing one section of the road for a day. By all this public right of way is shown to exist. On the other hand, the material placed by the respondent No.4 along with their affidavits does not establish, incontrovertibly that their predecessor in interest or they had no intention to dedicate or that the presumptive evidence in the nature of long user by the public is rebutted.

48. Mr.Aney, senior counsel for respondent No.4 submitted that the definition of public street in Section 2(42) cannot be read in isolation. The definition clause merely define terms. The right or obligations concerned in the term defined, have to be find in the statute. He referred to the definition of street in Section 2(48) and submitted that since the disputed pathway does not fall within the definition of street, obviously it is not public street under Section 2(42). He submitted that the scheme of chapter XI is that with respect to public street there has to be acquisition for laying a public street and in case of a street which is not a public street, vesting under Section 174(3) takes place only after following the procedure under Section 174(1) and (2). He would submit that in case of private street where repairs are carried

out, the Municipal Council shall, in the manner provided under Section 174 declares the street to be a public street and thereafter as per Section 175(2) it shall vests in the Council. He would submit that there is no such declaration or vesting much less any acquisition contemplated under Sections 173, 174 and 175. The senior counsel also contended that the disputed pathway has not been named or numbered as a public street as required by Section 185 of the Act of 1965 and that also suggests that the disputed road is not a public road.

49. The definition of street occurring in Section 2(48) means any road, footway, square, court-alley or passage, accessible whether permanently or temporarily to the public, whether a thoroughfare or not. It includes every vacant space, notwithstanding that it may be private property. The definition of street in Section 2(48) is very wide and extensive. We are unable to find any merit in the submission of Mr.Aney that the disputed way does not fall within the definition of street and, therefore, it cannot be public street. Rather we hold that the disputed pathway and the one-way bridge, without hesitation, fall within the definition of street under Section 2(48).

50. If in respect of any street, public has a right of way, obviously it is public street. A street which

is maintained by public funds is also a public street. That the disputed pathway and one-way bridge have been maintained by Ministry of Defence and thus by public funds is clearly established.

51. In so far as Section 173 is concerned, sub-section (1) thereof makes it lawful for the Municipal Council to lay out and make new public streets and to widen, open, extend or otherwise improve any public street. Sub-section (2) of Section 173 provides that no public street shall be closed permanently, save and except in accordance with the procedure prescribed therein. Sub-section (3) of Section 173 makes a provision inter alia that any laying out or making any public street, the Council may acquire the land required for the construction of buildings to form the said street. Section 174 enables the Municipal Council to give intimation of its intention to declare any street to be public street calling upon the objections from owner or greater portion of such street. Sub-section (2) of Section 174 entitles the Municipal Council to declare such street a public street after considering the objections and with the previous sanction of the Collector. Once such declaration is made under Section 174(3), such street become public street. Section 175 empowers the Municipal Council to require repair etc., of private streets and to declare them as public street.

The provisions of Sections 173(3) and 174 and 175 cannot be read to mean that unless the street is declared public street, such street shall not be public street even if it is covered by Section 2(42).

52. No doubt Section 185 provides that the Municipal Council shall give name and number to every public street but if a name or number to a public street is not given, that does not mean that a public street covered by Section 2(42) ceases to be a public street.

53. That the disputed road is a public road is substantiated by the fact that in the development plan published in the year 1978 under the Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act') for Lonavala declares the disputed pathway as road. The expression road / street is defined in paragraph 3.3.45 of the development plan as, 'Any Highway, street, lane, pathway, alley, stairway, passage way, carriageway, footway, square, place of bridge, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a specified period, whether existing or proposed in any scheme, and includes all bunds, challels, ditches, storm-water drains, culverts, sidewalks, traffic islands, roadside trees and hedges, retaining walls, fences, barriers and railings within

the street lines'. This supports the case of the petitioner that the disputed pathway is the street over which the public have a right of passage or access.

54. The submission was, however, made by Mr.Aney, senior counsel for respondent No.4 that the objection was raised by the respondent No.4 to the disputed road having been shown as public road in the draft development plan of the year 1986 and in the final development plan that was published in the Government Gazette dated June 28, 2005, the road previously shown as public road was no longer a public road. We perused the final development plan as published in the Government Gazette dated June 28, 2005 thoroughly and we are unable to accept the submission of the senior counsel for respondent No.4. The schedule of modifications appended to the development plan, Lonavala (second revision) reads thus :

Development Plan of Lonavala (Second Revision)

Accompaniment of Government Notification
No.TPS-1896/751/CR-82-96/96/UD-13,
dated 29th June, 2005

Schedule-I

Schedule of Modifications

Modification No.	Site No./ Gat No. etc.	Proposals as per the Development Plan published u/s 26 of M.R. & T.P.Act, 1966	Proposals as per the Development Plan submitted to the Govt. for sanction	Modifications sanctioned by Government u/s.31 of M.R. and T.P. Act, 1966.

			u/s.30 of M.R. & T.P. Act, 1966	
M-15	15 Mt. wide D.P. Road towards Bhushi-gaon	15 Mt.wide D.P. Road towards Bhushigaon	15 Mt. wide D.P. Road towards Bhushigaon	The proposed widening of the said 15 Mt.wide D.P. Road is shifted towards Eastern side as shown on plan.

55. A look at the schedule would show that in the proposal of the development plan published under Section 26 of the MRTP Act, 15 metres wide D.P. Road towards Bhushigaon was shown. The Planning Authority concurred with that. However, the State Government sanctioned the development plan with little modification by shifting the widening of 15 metres road towards eastern side. We are afraid, by this no inference can be drawn that in the development plan that was revised in the year 2005, the disputed road has been taken out of purview of public road.

56. It is true that the spillway is a channel that carries surplus water from the dam and technically it may be integral part of the dam but what is in issue in the present case is not the spillway by itself but a pathway on the spillway. In what we have already discussed above, we find no inconsistency in the public right in pathway on spillway despite the specific

character of spillway.

57. We have, thus, no hesitation in holding that the disputed pathway and the old bridge is a public road. In other words, it is public street within the meaning of Section 2(42) of the Act of 1965.

Re : (three)

Whether the closure of the pathway and the old bridge by respondent No.4 is unjustified ?

58. The permanent closure of the pathway and the old bridge by the respondent No.4 is sought to be justified inter-alia for security reasons. The case has been set up that by notification dated May 20, 1963, entire area where the Tata Power Dam is situated has been declared ‘protected place’ under Rule 7 of the Defence of India Rules. The respondent No.4 contends that the notification dated May 20, 1963 still holds the field as it has not been withdrawn until date. Reliance is also placed, in this connection, by respondent No.4 on the letter dated August 25, 2005 received from the police authority. It is submitted that the present situation in the country has changed and there is a constant threat to vital installations such as dams. The Lonavala dam is used for hydel power. The electricity

generated is utilized for supplying power to Mumbai. In the event of any deficit in power supply, the entire state grid may trip thereby causing colossal losses to the economy at large. It is stated that in the event of any untoward incident the low lying area are likely to get flooded and cause loss of life and property and, therefore, it is in the public interest that regardless of the petitioner, the disputed road is kept closed.

59. The notification dated May 20, 1963 was issued by the Home Department of the Government of Maharashtra in exercise of the powers conferred by Rule 7 of the Defence of India Rules, 1962 declaring the places specified in the schedule appended thereto to be a protected place. The relevant portion of the schedule reads thus :

Sr. No.	Name of the place.	Location	Description of its boundaries.
3.	Lonavala Dam and outlet sluices.	Village boundary of Village Bhushi and Lonavala	Main Dam. Bounded on the - -North by Survey No. 39. of Lonavala Village, -South by Survey No. 15 of Bhushi Village, -East by Survey Nos. 39-A, 39 and 28 in Lonavala Village, -West by Water expanse of Lonavala Lake. Lonavala auxiliary dam -

	Bounded on the - -North by Survey Nos. 74, 125 Pt.226, 255, 129 and 165, -South by water expanse of Lonavala Lake, -East by Survey Nos. 103 and 104, of Lonavala, -West by Survey No. 52 of Lonavala.

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60. The Defence of India Rules were made in exercise of the powers conferred under Section 38 of the Defence of India Act, 1962. The Defence of India Act, 1962 came into force on December 12, 1962 upon Proclamation of Emergency under clause (1) of Article 352 of Constitution of India by the President of India. Sub-clause (3) of Section 1 provides the duration of the Defence of India Act, 1962. Accordingly, the Act of 1962 is to remain in force during the period of operation of Proclamation of Emergency and for a period of six months thereafter. Meaning thereby that the life of Defence of India Act, 1962 shall come to end on expiry of six month from lifting the Emergency proclaimed under clause (1) of Article 352. That the Defence of India Act, 1962 is a temporary statute is not in question. Its duration is specified. When a temporary enactment expires, the Rules, notifications etc., issued thereunder also expire normally. The Defence of India Rules made under the Act of 1962 expired on expiry of the Act. Obviously, the aforesaid

notification issued by the State Government could not live beyond the life of the main Act and automatically came to an end on the expiry of the Act. However, submission was made by the senior counsel for respondent No.4 by relying upon sub-section (3) of Section 1 that the expiry of the Defence of India Act, 1962 has not affected the operation of the notification dated May 20, 1963 and it still holds the field.

61. We may reproduce Section 1(3) of the Defence of India Act, 1962, that reads thus :

> "1.(3) It shall remain in force during the period of operation of the Proclamation of Emergency issued on 26th October, 1962, and for a period of six months thereafter but its expiry under the operation of this sub-section shall not affect -
>
> (a) the previous operation of, or anything duly done or suffered under, this Act or any rule made thereunder or any order made under any such rule, or
>
> (b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or
>
> (c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act or any contravention of any rule made under this Act or of any order made under any such rule, or
>
> (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired".

62. We are afraid the notification dated May 20, 1963 cannot be held to hold the field by taking recourse to either of the clauses from (a) to (d) of sub-section (3) of Section 1. Clause (a) protects the previous operation of the Act or the rule or anything done or suffered. Clause (b) protects any right, privilege, obligation or liability acquired, accrued or incurred under the Defence of India Act or any rule made thereunder. Clause (c) does not affect any penalty, forfeiture or punishment incurred in respect of any offence under the Defence of India Act or any contravention of any rule made thereunder and clause (d) protects any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment. The notification dated May 20, 1963 is in the nature of prohibitory order as it declares the places specified therein to be protected places. Such declaration could not live beyond the expiry of six months from lifting the emergency. It is true that in the light of the clause (a) to (d) of Section 1(3), the expiry of the Defence of India Act, 1962 does not make the statute dead for all purposes. To the extent provided in clauses (a) to (d), previous operation of the Act,

rights, liabilities, legal proceedings etc., are protected. But the notification dated May 20, 1963 being in the nature of prohibitory order cannot be held to be protected beyond the life of the Act. Of course, the actions taken thereunder during the life of Act of 1962 are protected. we are not concerned with such actions.

63. The senior counsel for respondent No.4 referred to and relied upon four decisions of the supreme Court in support of his contention that the notification dated May 20, 1963 still holds the field. These decisions are: (i) The State of Uttar Pradesh V/s. Seth Jagamander Das and others, AIR 1954 SC 683, (ii) Mohan Choudhury V/s. The Chief Commissioner, Union Territory of Tripura, AIR 1964 Supreme Court 173, (iii) Messrs Rayala Corporation (P) Ltd. and M.R. Pratap V/s. Director of Enforcement, New Delhi, 1969 (2) Supreme Court Cases 412 and (iv) Krishna Kumar Singh and Another V/s. State of Bihar, (1998) 5 Supreme Court Cases 643.

64. In the case of Seth Jagamander Das, the Supreme Court observed, ‘when a Statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to the

enforcement of a repealed or a dead Act. Dealing with Section 3 of the Government of India Act, 1935, the Supreme Court observed, ‘Section 3 of this Act contains a saving clause to the effect that the repeal of an enactment by it was not to affect any other enactment in which such enactment has been applied, incorporated or referred to and that the Act was not affect the effect or consequences of any thing already done or suffered or any obligation or liability acquired or incurred or any remedy or proceeding in respect thereof or the proof of any past act or thing, or revive or restore any right, restriction, exemption or other matter or thing that had ceased to have effect under the repealed enactment’.

65. In the case of Mohan Chowdhury, the Constitution Bench of the Supreme Court considered the meaning of expression ‘instrument’ in paragraph 11 thereof thus :

> "11. Are the provisions set out above application (to) the construction of the Order of November 3, 1962, passed by the President suspending the petitioner’s right to move this Court ? It has not been contested that those provisions applied to the construction of the Act (LI of 1962) which repeals and re-enacts the provisions of the Ordinances aforesaid. But then the question arises whether they are available in construing the following words of the President’s Order ;
>
> "If any such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."
>
> Is the President’s Order in question an "instrument" within the meaning of the Section ?

The General Clauses Act does not define the expression "instrument". Therefore, the expression must be taken to have been used in the sense in which it is generally understood in legal parlance. In Stroud's Judicial Dictionary of Words and Phrases (Third Edition, Volume 2, page 1472), "instrument" is described as follows :

"An 'instrument' is a writing, and generally imports a document of a formal legal kind, Semble, the word may include an Act of Parliament .....(11) Conveyancing Act, 1881 (44 and 45 Vict. C. 41), S. 2 (xiii). 'instrument' includes deed, will, inclosure, award and Act of Parliament....."

The expression is also used to signify a deed inter parts or a charter or a record or other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory authority. We have no doubt in our mind that the expression "instrument" in S.8 was meant to include reference to the Order made by the President in exercise of his constitutional powers. So construed, the President's Order would, even after the repeal of the Ordinance aforesaid continue to govern cases of detention made under R.30 aforesaid under the Ordinances. It must, therefore, be held that there is no substance in the contention that the petitioner's detention originally made under the rule under the Ordinance would not be deemed to have continued under the Act (LI of 1962). Equally clearly, there is no substance in the contention that the same Order should have been repeated by the President after the enactment of the Act. It would have been a sheer act of supererogation and the legal fiction laid down in S.8 is meant to avoid such unnecessary duplication of the use of the constitutional machinery. A proper construction of the provisions of S.48 of the Act, which has replaced the Ordinances aforesaid read in the light of the provisions of S.8 of the General Clauses Act leaves no room for doubt that the detention order passed against the petitioner was intended to be continued even after the repeal of the Ordinances which were incorporated in the Act (LI of 1962). That being so, the

> Order of the President must have the effect of suspending the petitioner's right to move this Court for a writ of Habeas Corpus under Art. 32 of the Constitution. After the petitioner had been deprived, for the time being, of his right to move this Court, it is manifest that he cannot raise any questions as regards the vires of the Ordinances or of the Rules and Orders made thereunder. In the result, the application is held to be not maintainable, and, is therefore, dismissed".

66. In Messrs Rayala Corporation (P) Ltd and M.R. Pratap, the Supreme Court considered the meaning of expressions 'thing done' and 'temporary enactment' and with reference to Rule 132-A of the Defence of India Rules, 1962, which was omitted, observed that no prosecution can be instituted and can only afford protection to action already taken while the rule was in force after the omission of Rule 132-A of the Defence of India Rules, 1962.

67. The two Bench decision of the Supreme Court in the case of Krishna Kumar Singh is not unanimous. Sujata Manohar, J. held that the effect of an Ordinance cannot last beyond its lifetime, the only possible situation when this can happen is when any action already completed during the life of the ordinance has a permanent effect and broadly speaking irreversible. Her Ladyship held that any enduring consequences beyond the life of the Ordinance can only be brought about by legislation.

68. On the other hand, D.P. Wadhwa, J. held that if the right created by temporary statute or Ordinance is of enduring character and is vested in the person, that right cannot be taken away because the statute by which it was created has expired. It was further held that an Ordinance is effective till it ceases to operate. Even if it ceases to operate, the effect of the Ordinance is irreversible except by express legislation.

69. In our considered view none of the aforesaid judgments is of any help to the contention canvassed by the senior counsel for respondent No.4. The effect of expiry of the Defence of India Act and the Rules framed thereunder cannot last beyond its lifetime, save and except, in the circumstances covered by clauses (a) to (d) of sub-section (3) of Section 1. The notification dated May 20, 1963 is not covered by any of the clauses (a) to (d) of sub-section (3) of Section 1 of the Defence of India Act to last beyond the life of the Act.

70. Factually also, the said notification dated May 20, 1963 never remained in operation after the expiry of the Defence of India Act and the Rules framed thereunder, as admittedly the public continued to use the disputed way until September, 2004. If the notification dated May 20, 1963 had held the field as

contended by Mr.Aney and the disputed way was protected place, there was no question of public being allowed user thereof for last so many years after the expiry of the Defence of India Act.

71. In so far as the letter dated August 24, 2005 written by the Inspector of Lonavala City Police Station to the respondent No.4 is concerned, Mr.P.M. Patil, AGP conceded before us that the said letter by the Inspector of Police is without any authority and has no sanction in law. In view thereof, the ground set up by respondent No.4 that the Police Authority has directed the pathway over the spillway to be closed to the public does not stand.

72. At this stage, we may also notice the contention of Mr.K.K. Singhvi, that the notification dated May 20, 1963 issued under Rule 7 of the Defence of India Rules, 1962, as a matter of fact, does not specify the disputed road as protected place. According to him, what has been protected by the said notification is the main Lonavala dam and the Lonavala Auxiliary dam, the boundaries which have been described in the notification. Neither of the parties has given any details of the boundaries of the Lonavala dam and the Lonavala Auxiliary dam which has been declared as protected place by the notification dated May 20, 1963.

We, therefore, find ourselves unable to give any specific finding in this regard. We may, however, add that it was for the respondent No.4 to place on record the boundaries of the main Lonavala dam and the auxiliary Lonavala dam which were declared 'protected place' by the notification dated May 20, 1963. Be that as it may, for the reasons that we have already indicated above, we hold that the notification dated May 20, 1963, no longer holds the field.

73. Yet another reason justifying the closure of the disputed road given by the respondent No.4 is the agreement dated March 12, 2004 with the Lonavala Municipal Council. The respondent No.4 has set up the case that by the leave and licence agreement dated March 12, 2004, the respondent No.4 provided land adjacent to and parallel to the existing pathway over the spillway for construction of new bridge having width of 12 metres as against the width of 3.5 metres pathway and pursuant thereto, the new bridge has been constructed by the Lonavala Municipal Council. The said agreement provided closure of the existing road after construction of the new bridge having width of 12 metres.

74. We are afraid the agreement dated March 12, 2004 cannot justify the closure of public way, permanently, without following the procedure provided in sub-section

(2) of Section 173 of the Act of 1965. The public street can be closed permanently by following the procedure as provided in Section 173(2). For that the Chief Officer of the Municipal Council has to put a notice in the street which is proposed to be closed permanently and also on the notice board in the Municipal Office, declaring the intention of the Council to close the street permanently. The Council has to consider all objections to the said proposal made in writing and deliver at the Municipal office, within one month from the date of publication of the notice and, thereafter, the Municipal Council may pass resolution to close the public street permanently. The public street, therefore, can only be closed permanently in accord with Section 173(2) of the Act of 1965. The agreement dated March 12, 2004 is not and cannot be a substitute to the procedure provided for closure of a street permanently under Section 173 (2) of the Act of 1965.

75. Section 179 provides that no person shall, except any written permission of the Chief Officer under sub-section (4) thereof build or set up any fence or make any other obstruction in any public street. The building of the wall, fencing and the gates by respondent No.4 and closing the public street without written permission of respondent No.1 is unauthorised. Unilateral closure of the pathway and the old bridge

which is public street by respondent No.4 is illegal, unauthorised and not permissible and, therefore, the said action of respondent No.4 is indefensible.

76. The respondent No.1 wrote a letter to the respondent No.4 on November 17, 2004 directing them to remove the stonewall with wire fencing but the respondent No.4 did not comply the said directive. In the circumstances, the respondent No.1 ought to have discharged its statutory obligations and removed the unauthorised and illegal stonewall and fencing constructed by respondent No.4. Having failed in that an appropriate order deserves to be passed by us in the writ petition for redressal of the public injury.

77. In conclusion, we would say this: We gave deep thought to the credentials of the petitioner and found that the present writ petition has been filed by the petitioner in public interest for vindication of public right (of way) and the redressal of public injury. The user of the pathway and the old bridge by the general public for many many years is admitted and established. Upon careful study of the averments made in the writ petition, affidavits of the parties and the material available on record, the public right of way over the pathway and the old bridge is shown to exist and that the said pathway and the old bridge were being

maintained by INS Shivaji and, thus, by public funds. The obstruction by respondent No.4 on the pathway and the old bridge is illegal, unjustified and unauthorised.

78. We, accordingly, dispose of the writ petition (PIL) by following order :

i) The respondent No.4 shall remove, within two weeks from today, the parapet wall, iron barricades, the gates and any other obstruction on the disputed pathway and the one way bridge (old bridge) and the general public shall be entitled to use the said road as was being used prior to such obstruction.

ii) In case the respondent No.4 fails to do so within time aforedirected, we direct the respondent No.1- Municipal Council, Lonavala to demolish the offending parapet wall, fencing, iron barricades, gates and any other obstruction on the disputed pathway and old bridge immediately thereafter and restore the usage of the said road to the general public as was being done prior to such obstruction.

iii) No costs.

79. At this stage, the counsel for the respondent No.4 submits that the said respondent may consider challenging this judgment before the Supreme Court and, therefore, prays that operation of the judgment be stayed. Though the matter relates to the closure of the public road, for the stated reason, we order that the operation of our order shall remain suspended for a period of six weeks from today.

(R.M. LODHA, J.)

(NARESH H. PATIL, J.)